gent one of "soaking" the insurance company. And even if, in life and in fire insurance, it represented sound policy not to unwind the transaction when once payment of the claim had been made, in the absence of fraud, still the same rule of policy, if there be any, would not be applicable under the circumstances in the instant case to insurance against theft of an automobile. In life and in fire insurance any loss means a complete loss as far as the insurer is concerned; because there is no subrogation in favor of an insurer of lives, and the right of subrogation in favor of an insurer against fire damage to property is practically valueless because so seldom invoked against third parties and, even if invoked, seldom against responsible third parties. In insurance against theft of an automobile, however, the right to be subrogated to the rights of an owner and to be entitled to claim the automobile when located is a valuable right. It undoubtedly enters into the calculation of the premium rates and is in fact an essential element in the organization on a sound basis of this form of insurance, in which the moral hazard is so very great. Salvage is as valuable and essential a right in theft insurance as in marine insurance.

This particular insurer was authorized and intended to insure an owner's and not a limited interest, and in fact insisted both in the application for the policy and in the proof of loss that the assured repeat a warranty of sole and unconditional ownership. Under the circumstances it seems quite clear that the insurer upon prompt payment of the loss-claim expected to receive and the assured to transfer the very valuable right of an owner of such automobile. The real owner of the automobile having claimed and retaken it, there was a failure of consideration in that the insurer did not get what the parties expected it would get.

Perhaps the most equitable rule would be that at least where the breach of the warranty relied on by the insurer actually defeated its right of subrogation, recovery by such insurer should be allowed. In the instant case the breach of warranty of sole and unconditional ownership defeated an actual and not an inchoate right of subrogation because the car was found. Consequently, the insurer under the facts of this particular case should have been permitted to recover.

THE MEANING OF THE WORDS "CAUSE OF ACTION" AS USED IN THE NEW YORK CODES.—In the recent case of *Bernstein* v. *Orlevitch* (App. Div., 2d Dept. 1921) 187 N. Y. Supp. 720, the plaintiff sued the director of a corporation, alleging a violation of his rights as a stockholder and also a violation of rights under a contract to buy stock. *Held,* the causes of action should be separately stated. This decision suggests an inquiry into the nature of a cause of action, inasmuch as the courts rarely give any reasons for decisions of this kind.

(1) Under the New York Code of Civil Procedure it was stated that the complaint must contain "A plain and concise statement of the facts constituting each cause of action."[1] The Civil Practice Act states that it must contain "A statement of each cause of action."[2] But the Act calls the complaint a pleading[3] and says, "Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party relies. . . ."[4] It cannot be doubted that the difference from the former statute which the latter indicates, is one of position only. The "cause of action," whatever it was under the Code, is the same thing under the Act. The decisions which refer to these provisions are unfortunately singular in that they throw very little light on the

[1] § 481, subd. 2.
[2] § 255, subd. 2. Thus far the change was a good one because it eliminated the enactment of theory into law. That is, the old form indicated of what a cause of action is constituted, but that portion of the statute is eliminated in the new form.
[3] § 254. [4] § 241.

nature of the cause of action but show rather what one must or must not do with it, assuming it to exist. It is to be noted, however, that the Code regarded the cause of action as constituted of "facts."[5] It is plain, nevertheless, that the statute did not mean legally determined facts or, as one court defined the term, " . . . a thing done, *reality, not supposition,* action, deed,"[6] because an answer usually raises an issue of fact.[7] The better view seems to be that the word "facts" in this connection means an allegation of fact.[8] When a court speaks of a cause of action as being assignable,[9] therefore, it is not using the term in the same sense that these sections use it. It has been stated that "a cause of action is the existence of those facts which give a party a right to judicial interference in his behalf."[10] But that cannot be the meaning here because a court may decide whether or not a complaint states a cause of action without deciding whether or not the plaintiff could recover thereon;[11] and this state of the law seems to be recognized by the Civil Practice Act.[12] To say that "a cause of action must show a legal or equitable right in one party and a wrong in the other party . . . "[13] is likewise not a description of what is meant by the sections under consideration, for if that were true, when a cause of action had been stated there would be no need for proceeding further. The entry of judgment for the plaintiff would then follow as a matter of course. Nor do the words "cause of action" under these sections mean " . . . the right which a party has to institute and carry through . . . proceedings."[14] Forbearance to sue by one who erroneously but honestly believes he has a good cause of action can be consideration for a promise.[15] Hence one has the right or privilege, under the circumstances set out, to sue on a bad cause of action. It follows from the above definition that this privilege is itself a cause of action, whereas the courts have often repeated the statement that "a bad cause of action is no cause of action."[16] Inasmuch as the same occurrence may give rise to more than one cause of action if it is described differently,[17] only one conclusion may be drawn concerning the fundamental nature of a cause of action under these sections, and that is that it is an allegation. It is submitted that a plaintiff states a cause of action when he alleges the existence of a certain state of affairs[18] which existence, considered alone, would entitle him to a judgment or a decree. In other words, the question which a

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[5] § 481, subd. 2.

[6] *Lackey* v. *Vanderbilt* (N. Y. 1854) 10 How. Pr. 155, 161. The court thus interpreted the word "facts" in § 142 of the Code of Procedure which read substantially the same as § 481 of the Code of Civil Procedure.

[7] N. Y. Civ. Prac. Act § 422.

[8] *Wright* v. *Larkin* (1915) 91 Misc. 573, 576, 154 N. Y. Supp. 961.

[9] *Woodbury* v. *Deloss* (N. Y. 1873) 65 Barb. 501, 503.

[10] *Billing* v. *Gilmer* (C. C. A. 1894) 60 Fed. 332, 334.

[11] *Blanchard* v. *Jefferson* (1892) 63 Hun 631, 17 N. Y. Supp. 927.

[12] "The complaint must contain. . . . 3. A demand of the judgment to which the plaintiff supposes himself entitled." § 255, subd. 3.

[13] *Cowley* v. *North Pac. Ry.* (1912) 68 Wash. 558, 563, 123 Pac. 998.

[14] *Meyer* v. *Van Collem* (N. Y. 1858) 28 Barb. 230, 231.

[15] See *McKinley* v. *Watkins* (1851) 13 Ill. 140, 143, 144.

[16] "If, therefore, a person have a legal right to sue, he must necessarily have a 'good' . . . 'cause of action.' If he have no legal right to sue, he has not merely a bad cause of action, but no cause of action. So, 'good cause of action' can mean no more than 'cause of action' and the word 'good,' in that connection, is hence merely superfluous." *Parker* v. *Enslow* (1882) 102 Ill. 272. Despite this emphatic statement of the court, it seems to have been made without taking account of the situation in *McKinley* v. *Watkins, supra,* footnote 15, where it was recognized that one may have a legal right to sue although he could not recover.

[17] See *Glover* v. *Holbrook, etc. Corp.* (1919) 189 App. Div. 328, 329, 178 N. Y. Supp. 517.

[18] The word "facts" is not used here because of its ambiguity—*i. e.,* "alleged facts" or "legally established facts."

judge asks himself in endeavoring to determine whether or not a complaint states a cause of action is, "If what the complaint states were established and nothing more were shown by either party, would the plaintiff be entitled to a judgment or decree, as the case may be?" Since the instant case contained two such allegations, it was undoubtedly correctly decided.

(2) The Civil Practice Act also provides for the joinder of causes of action in certain cases if they are not inconsistent with each other.[19] At first sight, this provision seems harmonious with the definition set out in (1), but the courts have interpreted the words "cause of action" similarly used in the Code of Civil Procedure,[20] to mean the legal conclusions involved in the allegations.[21] The allegations themselves may be inconsistent, but if from all the allegations the same legal conclusions must be drawn, the mandate of the statute regarding joinder of causes has been held to have been fulfilled and the causes of action are consistent.[22]

(3) The Civil Practice Act provides in addition, that in certain cases an attachment may be levied on a cause of action.[23] Under the Code, we find the courts allowing the attachment of a debt due to a creditor.[24] But if there is no right in favor of him whose property is sought to be attached, it is not attachable.[25] A right which is sure to accrue within a fixed time, however, is attachable.[26] It is plain, therefore, that "cause of action" under this section means something different from what it was stated to mean in (1) and (2). Here a "cause of action" means an absolute or conditional[27] claim to a sum certain in money.

(4) The Civil Practice Act speaks also of the survival of causes of action.[28] Under a similar section of the Code, a plaintiff sued for damages alleged to have been caused by the defendant's negligence, and was non-suited. The plaintiff then took an appeal, and died while it was pending. The court held that the

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[19] "The plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, whether they are brought to recover as follows . . . It must appear on the face of the complaint that all the causes of action so united . . . are consistent with each other." N. Y. Civ. Prac. Act § 258. [20] § 484.

[21] *McClure* v. *Wilson* (1897) 13 App. Div. 274, 43 N. Y. Supp. 209; *Drexel* v. *Hollander* (1906) 112 App. Div. 25, 98 N. Y. Supp. 104; *Kaufman* v. *Morris Bldg. Co.* (1908) 126 App. Div. 388, 110 N. Y. Supp. 663. A cause of action for breach of contract was joined with another for fraud in inducing the plaintiff to make the contract but the joinder was held bad because the one involved the conclusion that a contract existed and the other that no contract existed. The court said, "To assert the one is to negative the other, and the plainiff has to elect which he will sue on. He cannot sue on both." *Edison Electric, etc. Co.* v. *Kalbfleisch* (1907) 117 App. Div. 842, 102 N. Y. Supp. 1039.

[22] An allegation stated that a wife survived a husband and another allegation stated that the husband prevented the survival of the wife by killing her. In either event the husband's estate would be liable under the same contract to the wife's estate. Hence the court held the causes of action to be consistent. *Logan* v. *Whitley* (1908) 129 App. Div. 666, 114 N. Y. Supp. 255.

[23] "The attachment may also be levied upon a cause of action . . . for the payment of money only . . . whether past due or yet to become due. . . . " N. Y. Civ. Prac. Act § 916.

[24] *Westervelt* v. *Phelps* (1902) 171 N. Y. 212, 63 N. E. 962 (*semble*); *Warner* v. *Fourth Nat'l Bank* (1889) 115 N. Y. 251, 22 N. E. 172.

[25] *Rosenberg* v. *Occidental Trading Co.* (1919) 189 App. Div. 330, 178 N. Y. Supp. 477; *Columbia Bank* v. *Equitable Assurance, etc.* (1903) 79 App. Div. 601, 80 N. Y. Supp. 428.

[26] *Kratzenstein* v. *Lehman* (1896) 18 Misc. 590, 42 N. Y. Supp. 237.

[27] The condition must be certain to occur.

[28] "An action does not abate by any event if the cause of action survives or continues." N. Y. Civ. Prac. Act § 82. "In the case of the death of a sole plaintiff or a sole defendant, if the cause of action survives . . . " *Ibid.* § 84.

plaintiff's administratrix could not continue to prosecute the appeal because the cause of action did not survive.[29] It is plain that the court regarded the cause of action here as the plaintiff's privilege to have the question of the defendant's liability to the deceased, had he lived, judicially determined.[30]

It is regrettable that in the recent change from the Code of Civil Procedure to the Civil Practice Act, the legislators did not correct this unscientific terminology. Perhaps no particular misfortune will occur because of it, but in law, if nowhere else, consistency is a virtue.

THE EFFECT OF THE STATUTE OF FRAUDS ON ORAL AGREEMENTS RELATING TO REALTY.—The courts have decided that two sets of circumstances serve to take a case out of the Statute of Frauds.[1] One is part performance.[2] The Statute was adopted to avoid the uncertainties that accompanied parol agreements, especially when actions based on them do not arise until several years after the alleged contract.[3] But when a party has performed, the evidence is not so uncertain. Hence equity will decree specific performance under these restrictions: (1) That the so-called part performance suggest some agreement between the parties with regard to the land.[4] Then evidence is allowed showing just what that contract is. (2) That the plaintiff establish by clearly convincing evidence[5] the existence of the agreement, instead of by the fair preponderance[6] that is usual in civil actions. Fraud is the other circumstance. The avowed purpose of the Statute was to prevent the establishment of contracts by false swearing. Hence, it does not prevent equity from exercising its customary jurisdiction on the ground of fraud.[7] The recent case of *Fletcher* v. *Manhattan Life Ins. Co.* (App. Div., 1st Dept. 1921) 189 N. Y. Supp. 453 exemplifies the comprehensive nature of the doctrine of fraud in equity. The plaintiff and defendant were participating owners of a mortgage, the plaintiff holding the junior lien. They brought a foreclosure action. Prior to the sale, it was orally agreed between

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[29] *Lutz* v. *Third Avenue R. R.* (1899) 44 App. Div. 256, 60 N. Y. Supp. 761.

[30] In *Daniel* v. *Brooklyn Heights R. R.* (1912) 76 Misc. 482, 135 N. Y. Supp. 698, the cause of action was held to survive although it was not certain that the plaintiff could get judgment.

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[1] St. 29 Car. II (1676) c. 3. A typical American statute is N. Y. R. P. Law (Cons. Laws 1909) § 242.

The Statute of Frauds also renders void parol agreements for express trusts. Act (1676) 29 Car. II c. 3, § vii. For New York see *supra*. The discussion in the note is just as applicable to trusts, as to simple direct conveyances. *Leman* v. *Whitley* (1828) 4 Russ. 423.

[2] *Ryan* v. *Dox* (1866) 34 N. Y. 307; *Logan* v. *Brown* (1908) 20 Okla. 334, 95 Pac. 441. (Agreement to sell land and hold proceeds in trust. Land was sold, and the defendant was declared a trustee as to the proceeds, though the agreement as to the land was not enforceable.)

[3] See Smith, *Law of Frauds* (1907) § 311.

[4] *Woolley* v. *Stewart* (1918) 222 N. Y. 347, 118 N. E. 847; see *Williams* v. *Morris* (1877) 95 U. S. 444, 457. Part performance may be carried through in two ways, either, as in the latter case, one party conveys, and thus does what he could not be compelled to do, leaving only the payment, which is not forbidden by the Statute; or the plaintiff performs so far that he has no means at law for restoring the *status quo*. *Cf. Glass* v. *Hulbert* (1869) 102 Mass. 24.

Specific performance is frequently given after part performance on the ground that the defendant, having been benefited at the expense of the plaintiff, to plead the Statute is fraudulent. See *Collins* v. *Lackey* (1912) 31 Okla. 776, 779, 780, 123 Pac. 1118; *Russell* v. *Sharp* (1905) 192 Mo. 270, 288, 91 S. W. 134.

[5] *Carr* v. *Craig* (1908) 138 Iowa 526, 116 N. W. 720; *Boone* v. *Lee* (1918) 175 N. C. 383, 95 S. E. 659.

[6] 4 Wigmore, *Evidence* (1905) § 2498.

[7] *Arnold* v. *Cord* (1861) 16 Ind. 177.